

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 10, 2007

IN RE B.L.C., D.A.C. & J.L.C.

**Appeal from the Juvenile Court for Sumner County
Nos. 78-35, 76-241, 76-610 Barry R. Brown, Judge**

No. M2007-01011-COA-R3-PT - Filed December 6, 2007

The issue presented in this case is whether the trial court erred in terminating the parental rights of the Mother and Father. After careful review, we reverse the trial court's judgment terminating Mother's parental rights on the ground of abandonment because (1) the Tennessee Department of Children's Services ("DCS") failed to prove that it provided Mother the statutorily required notice that must be given to a parent as a prerequisite to a proceeding to terminate on the ground of abandonment; (2) the evidence preponderates against the conclusion that DCS proved by clear and convincing evidence that Mother willfully abandoned her children; and (3) that DCS was not relieved of its statutory duty to provide reasonable efforts to reunify Mother and children until a court of competent jurisdiction entered an order finding that Mother had abandoned the children, and not before such finding was made. We affirm the trial court's ruling terminating Father's parental rights because he took the position throughout the entire trial that he was not contesting his termination, and only for the first time on appeal raises the issue of whether the trial court erred in terminating his parental rights.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed in Part
and Reversed in Part; Case Remanded**

SHARON G. LEE, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

Randy P. Lucas, Gallatin, Tennessee, for the Appellant, C.M.C.

Heather Haufler, Hendersonville, Tennessee, for the Appellant, D.B.C.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth C. Driver, Senior Counsel, Nashville, Tennessee, for the Appellee, State of Tennessee, Department of Children's Services.

W. Brian Stephens, Gallatin, Tennessee, guardian ad litem for minors B.L.C., D.A.C., and J.L.C.

OPINION

I. Background

This appeal involves the termination of Mother's and Father's parental rights to their three children: B.L.C., born on September 14, 1998; D.A.C., born on August 7, 2000; and J.L.C., born on November 8, 2001. This case was initiated by Father filing a petition for custody of J.L.C. in Sumner County Juvenile Court on September 28, 2005. The petition alleged that J.L.C. was currently in the custody and control of Father's parents. At the time of the petition, Mother and Father had separated, and there is no indication in the record that Mother was given notice of the petition or the hearing, which occurred on November 2, 2005.¹ After the hearing, the juvenile court divested the grandparents of custody and granted Father custody of J.L.C. The trial court's order reflects that the grandparents were at the hearing and in agreement with Father that he should be granted custody.

On December 21, 2005, after a hearing, the juvenile court entered an order² finding J.L.C. and B.L.C. dependent and neglected and granting DCS temporary legal custody. Although various documents in the record, including DCS's petition for termination and subsequent orders of the trial court, state that all three of the children were found dependent and neglected and placed in DCS's custody on December 21, 2005, and this assertion appears undisputed, the trial court's written orders in the record pertain only to J.L.C. and B.L.C. There is no indication in the record that Mother was given notice or was aware of the December 21, 2005 hearing.

A permanency plan was developed by DCS for each of the children at a staffing meeting on January 4, 2006. Father was present at the meeting, and he signed both the plans and a document provided by DCS which explained the criteria and procedures for termination of parental rights. The permanency plans provided for dual alternative goals of adoption and reunification with the parents, and they set a goal target date of July 4, 2006. Although the permanency plans listed responsibilities and requirements for Mother, she was not given a copy of the permanency plans, and there is no indication in the record that DCS attempted to notify her of what was required of her.

DCS filed a petition to terminate Mother and Father's parental rights on September 29, 2006, alleging abandonment, Tenn. Code Ann. § 36-1-113(g)(1), and persistent conditions, Tenn. Code Ann. § 36-1-113(g)(3), as grounds. DCS alleged the additional ground of substantial noncompliance with the permanency plans, Tenn. Code Ann. § 36-1-113(g)(2), against Father only. After a termination hearing on April 11, 2007 at which both parents participated, the trial court terminated Mother's parental rights on the ground of abandonment, and terminated Father's parental rights on

¹Father's petition named Mother and stated that her residence was "unknown." Mother's testimony at the termination hearing, which the trial court generally found to be credible, contradicts the assertion that Father did not know how to contact Mother.

²The juvenile court's written order regarding J.L.C. was entered on February 15, 2006, *nunc pro tunc* to December 21, 2005. The juvenile court's written order regarding B.L.C. was entered on March 22, 2006, *nunc pro tunc* to December 21, 2005.

the grounds of abandonment and substantial noncompliance with the permanency plans. The trial court further found by clear and convincing evidence that termination of the parents' rights was in the best interest of the children.

Regarding its adjudication of Mother's parental rights, the trial court found that although DCS had "failed miserably" in making any attempts to locate or notify Mother of the legal proceedings, that failure did not preclude a finding that Mother had willfully abandoned her children, stating as follows:

The Court finds that [DCS] failed miserably in conducting a proper diligent search for the Defendant Mother and further failed to make any reasonable efforts to assist her with the services she needed. For this reason, the Court finds that [DCS] has not met its burden to establish grounds of abandonment by failure to establish a suitable home or persistence of conditions. However, the lack of reasonable efforts is not fatal to the grounds of willful abandonment, and the Court does find by clear and convincing evidence that the Defendant Mother willfully failed to visit and willfully failed to support the [children].

Regarding the adjudication of Father's parental rights, Father, who was ably represented by legal counsel, took the position throughout the course of the entire hearing that he was not contesting the termination of his rights. Father did not challenge the evidence presented by DCS in support of its arguments that statutory grounds supporting termination of Father's rights existed and that termination was in the children's best interest. As noted, after hearing the proof, the trial court ruled that DCS had established by clear and convincing evidence that Father had willfully abandoned his children and had failed to substantially comply with the requirements of the permanency plans.

II. Issues Presented

Both Mother and Father have appealed the trial court's judgment terminating their parental rights. Mother raises the issue of whether the trial court erred in finding by clear and convincing evidence that she abandoned the children. Although Mother also raises the issue of whether the trial court erred in finding it was in her children's best interest that her rights be terminated, we do not reach this issue because of our holding that DCS failed to meet its burden of proof in demonstrating a statutory ground for termination. Father, despite his assertion throughout the trial that he elected not to contest the termination of his parental rights, now argues on appeal that the trial court erred in terminating his parental rights.

III. Analysis

A. Standard of Review

Our standard of review is as recently restated by this court in *In re Adoption of T.Z.T.*, No. M2007-00273-COA-R3-PT, 2007 WL 3444716, at *2-3 (Tenn. Ct. App. M.S., filed Nov. 15, 2007) as follows. It is well-settled that biological parents have a constitutionally-protected, fundamental right to the care, custody, and control of their children. See *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); see also *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App.1989); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993). Although this right is fundamental, it is not absolute and the state may interfere with parental rights upon showing a compelling state interest. *Santosky*, 455 U.S. at 747. However, both the federal and state constitutions require the opportunity for an individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away. *Stanley v. Illinois*, 405 U.S. 645, 658-59, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). Tennessee has adopted a statutory basis for determining when the state, through court action, may interfere with parental rights by terminating them completely. Because the parent-child relationship is afforded pronounced constitutional protections, adoption proceedings must “contain safeguards against unwarranted termination or interference with a biological parent's parental rights.” *O’Daniel v. Messier*, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995), *superseded by statute on other grounds*.

The termination of one’s rights as a parent is one of the most serious tasks relegated to the courts due to the finality of the act, for “[a]n order terminating parental rights shall have the effect of *severing forever all legal rights and obligations* of the parent[.]” Tenn. Code Ann. § 36-1-113(l)(1) (emphasis added). In Tennessee, a court may terminate a person’s parental rights only if the party seeking termination proves by clear and convincing evidence (1) the existence of at least one statutory ground for termination and (2) that termination of the parent’s rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

Because of the finality of these decisions, parties seeking to terminate parental rights are held to a heightened burden of proof and must prove one or more of the statutorily defined grounds for termination by clear and convincing evidence.³ Tenn. Code Ann. § 36-1-113(c)(1). In order to be clear and convincing, the evidence must be of the type “in which there is no serious or substantial doubt about the correctness of the conclusions drawn” therefrom. *In re Valentine*, 79 S.W.3d at 546 (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992)); see also *O’Daniel*, 905 S.W.2d at 188. “The use of a heightened standard reflects the importance of the public and private interests affected by an adoption” and should invoke in the fact-finder’s mind a firm belief or conviction as to the truth of the allegations sought to be proved. *O’Daniel*, 905 S.W.2d at 187, 188 (citations omitted). *In re Adoption of T.Z.T.*, No. M2007-00273-COA-R3-PT, 2007 WL 3444716, at *2-3 (Tenn. Ct. App. M.S., filed Nov. 15, 2007).

³The grounds for terminating parental rights are enumerated in Tenn. Code Ann. § 36-1-113(g).

B. Abandonment as Ground for Terminating Mother's Parental Rights

1. Notice to Mother of Consequences of Abandonment

The trial court terminated Mother's parental rights pursuant to its finding that Mother had abandoned her children, a statutory ground provided at Tenn. Code Ann. § 36-1-113(g)(1). Tennessee law defines "abandonment" in several different ways at Tenn. Code Ann. § 36-1-102(1)(A), but the applicable definition in the present case requires a showing by clear and convincing evidence that "[f]or a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent . . . of the child who is the subject of the petition for termination of parental rights or adoption, that the parent . . . either [has] willfully failed to visit or [has] willfully failed to support or [has] willfully failed to make reasonable payments toward the support of the child." Tenn. Code Ann. § 36-1-102(1)(A)(i).

As a prerequisite to a proceeding to terminate on the ground of abandonment, the Tennessee legislature has established statutory requirements for the type of notice that must be given to a parent when the child has been placed in foster care. *In re J.L.E.*, No. M2004-02133-COA-R3-PT, 2005 WL 1541862 (Tenn. Ct. App. M.S., filed June 30, 2005). The required notice varies depending on the extent of the parent's participation in the formation of the permanency plan. The *In re J.L.E.* Court recently summarized these statutory notice provisions and the rationale for them, stating as follows:

Tennessee Code Annotated § 37-2-403 establishes requirements for a permanency plan for a child placed in foster care. It also establishes requirements for notice to parents of the definition and potential consequences of "abandonment" as that term is defined in Tenn. Code Ann. § 36-1-102. First, that definition and the potential and procedures for termination of parental rights are to be included on the initial permanency plan itself, which is to be signed by the parent. Tenn. Code Ann. § 37-2-403(a)(2)(A). Second, at the hearing on the court's consideration of the permanency plan, the court "shall explain on the record the law relating to abandonment contained in § 36-1-102." Tenn. Code Ann. § 37-2-403(a)(2)(B)(i). If the parents are not present at the first hearing, the court is to make the required explanation at any subsequent hearings. *Id.*

In re J.L.E., 2005 WL 1541862, at *7 (footnote omitted). If the parents do not appear at permanency plan hearings or cannot be provided notice of such hearings, DCS may still proceed to terminate parental rights on the ground of abandonment when the child or children have been placed in foster care "under § 36-1-102" *only if* DCS demonstrates specified things at the time of the termination proceeding. *Id.*; Tenn. Code Ann. § 37-2-403(a)(2)(B)(ii). Those showings are:

(a) That the court record shows, or the petitioning party presents to the court a copy of the permanency plan or plan of care that shows that the defendant parents or legal guardians, subsequent to the court review in subdivision (a)(2)(B)(i), has signed the portion of the permanency plan or plan of care which describes the criteria for establishing abandonment under § 36-1-102, or that the court record shows that, at a subsequent hearing regarding the child, the court made the statements to the parents or legal guardians required by subdivision (a)(2)(B)(i).

(b) By an affidavit, that the child's permanency plan or plan of care containing language which describes the criteria for establishing abandonment under § 36-1-102 was presented by the agency party to the parents or guardians at any time prior to filing the termination petition, or that there was an attempt at any time to present the plan which describes the criteria for establishing abandonment under § 36-1-102 to the parents or guardians at any time by the agency party, and that such attempt was refused by the parents or guardians.

(c) That, *if the court record does not contain a signed copy of the permanency plan or plan of care*, or if the petitioning agency cannot present evidence of a permanency plan or plan of care showing evidence of such notice having been given or an affidavit showing that the plan was given or that the plan was attempted to be given to the parents or guardians by the agency and was refused by the parents or guardians, and, in this circumstance, *if there is no other court record of the explanation by the court of the consequences of abandonment and the right to seek an attorney at any time*, then the petitioning agency shall file with the court an affidavit in the termination proceeding which describes in detail the party's diligent efforts to bring such notice required by subdivision (a)(2)(B)(i) to such parent or guardian at any time prior to filing the agency's filing of the termination petition.

Tenn. Code Ann. § 37-2-403(a)(2)(B)(ii)(emphasis added); *In re J.L.E.*, 2005 WL 1541862, at *7-8; see also *State Dep't of Children's Services v. K.W.C.*, No. E2007-00307-COA-R3-PT, 2007 WL 2198593, at *9-10 (Tenn. Ct. App. E.S., filed Aug. 1, 2007). "The notice provisions of the statute are designed to inform parents, before they engage in conduct constituting abandonment, of the potential consequences of that conduct. Otherwise, it has no real purpose." *In re J.L.E.*, 2005 WL 1541862, at *9.

In this case, DCS failed to prove by clear and convincing evidence that the statutory notice requirements were met regarding its efforts to notify Mother. The permanency plans and statements explaining the criteria and procedures for termination of parental rights were provided to and signed by Father, but not Mother. There is no indication that the trial court explained to Mother (or that it

had opportunity to explain) on the record the law relating to abandonment. Thus, Mother did not have notice of the definition and potential consequences of “abandonment” as defined by statute. DCS did not file an affidavit in the termination proceeding describing in detail its diligent efforts to bring such notice, as described and required by Tenn. Code Ann. § 37-2-403(a)(2)(B)(ii)(c). *In re J.L.E.*, 2005 WL 1541862, at *10; *State Dep’t of Children’s Services v. K.W.C.*, 2007 WL 2198593, at *10.

Moreover, the trial court found in its written order that DCS had “failed miserably” in its efforts to locate and notify Mother of her children’s whereabouts and the legal proceedings, and the evidence does not preponderate against this finding. Mother testified that she believed that the children had remained in Father’s custody or in Father’s parents’ custody until October of 2006. Mother stated that her attempts to visit the children while Father’s parents had them prior to December of 2005 were rejected, and that the grandparents “wouldn’t let me see my kids at all.” The trial court specifically found in its written order that “the Court found Mother’s testimony to be credible, but it was abundantly clear that she was very confused about dates and had no idea where her children were over the past several years.”

Mother also testified that she was not served with any papers, stating that “my mailing address was my parents’ and it’s always been that, and I have received no letters or nothing saying that my kids was in State’s custody.” DCS case manager Traci Dutchover, one of the managers assigned to Mother’s case, testified that she received the case in August of 2006, but that she was off the case for maternity leave from December 18, 2006⁴ to February 2, 2007. DCS did not present any evidence that it did anything on Mother’s case during the time Ms. Dutchover was on maternity leave. The case manager previously assigned to Mother’s case, Patty Crowley, did not testify. Ms. Dutchover testified as follows in relevant part regarding DCS’s efforts to locate and notify Mother:

Q: Can you tell me what reasonable efforts the Department has made to provide her services?

A: To my knowledge, her whereabouts were unknown to provide those services.

Q: Okay. And to your knowledge, what efforts did the Department make to try and find her?

A: I’m not aware of that.

Q: To your knowledge, prior to – in the four months prior to September 29th, 2006, did the Department make any efforts to provide [Mother] with any visitation with her children?

A: No, sir.

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⁴Ms. Dutchover actually testified that she was “off the case from December 18th of ‘05 to February 2nd of ‘07,” but her starting date of 2005 appears to be a misstatement because she was not assigned the case until August of 2006; she apparently meant to say “2006” instead of “2005.”

Q: And, again, what efforts did the Department make, reasonable or otherwise, to try and determine her whereabouts, to the best of your knowledge?

A: To the best of my knowledge, I don't know what efforts were made by Ms. Crowley.

Q: Is it fair to say that based upon the record that you have, that you're the custodian of, that the Department made little or no effort to try and determine her whereabouts?

A: That could be fair.

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Q: Can you, as you sit here today, tell the Court, under oath, that [Mother] has willfully failed to visit with her children?

A: I cannot testify to that, no, sir.

Q: Okay. Can you testify truthfully to the Court that she has willfully failed to make reasonable child support payments?

A: I cannot testify to that. I'm not aware of, besides my knowledge from [DCS's attorney], that she's not paying, no, sir.

Ms. Dutchover did testify as to a single possible contact with Mother by Ms. Crowley, stating that "according to the case records, Ms. Crowley made phone contact with [Mother] on January 3rd of '06 and informed her that the [children] were in custody." The "case records" to which Ms. Dutchover referred were not entered into evidence, and as noted, Ms. Crowley did not testify at the termination hearing. Mother testified that she did not know that the children were in DCS's custody until October of 2006, after the termination petition was filed. The Court Appointed Special Advocate (CASA) worker assigned to this case also testified that "[Mother] still thought – when I went to see her, up until October 2006, she still thought the [children] were in [Father's] custody."

We conclude that the trial court erred in terminating Mother's parental rights on grounds of abandonment because DCS failed to provide Mother with the statutory notice required by Tenn. Code Ann. § 37-2-403(a)(2).

2. Abandonment by Willful Conduct

The trial court terminated Mother's parental rights largely because she had not seen the children, nor paid any child support, from the time DCS took custody in December 2005 until after the termination petition was filed in September of 2006. Mother explained this long absence from the lives of the children by, among other things, her testimony that the paternal grandparents had previously rebuffed all her attempts to visit and offers of support. Mother stated that she could not pay child support for part of that time because "at that time I wasn't stable or whatever. I didn't have a job or nothing. I was living in a shelter." Mother further stated that "I was living in a shelter for three weeks and couldn't take my kids out on the street. I'd rather see [the children] living in a home than out on the street with me. Now I've got myself together. I've got a stable home." Mother denied that her failure to visit and failure to pay child support was willful, and she also denied that she knew that failure to visit and pay support could result in her parental rights to her children being

terminated. See *In re Muir*, No. M2004-02652-COA-R3-CV, 2005 WL 3076896, at *4-5 (Tenn. Ct. App. M.S., filed Nov. 16, 2005) (stating “[t]he concept of ‘willfulness’ is at the core of the statutory definition of abandonment” and defining and discussing the concept of “willfulness”); *In re C.M.C.*, No. E2005-00328-COA-R3-PT, 2005 WL 1827855, at *6-7 (Tenn. Ct. App. W.S., filed Aug. 3, 2005), and cases cited therein. Although DCS proved a lack of support and visitation, it failed to prove that Mother’s conduct was willful.

Based on our review of the entire record, including the evidence summarized above, we conclude that the trial court erred in terminating Mother’s parental rights on grounds of abandonment because the evidence preponderates against the conclusion that DCS proved by clear and convincing evidence that Mother willfully abandoned her children.

3. Lack of Reasonable Efforts by DCS

The trial court held that although DCS failed to make reasonable efforts to assist Mother and provide her with services directed toward reunification with her children, a parent’s abandonment of his or her child relieves DCS of its duty to make such reasonable efforts. In support of the trial court’s ruling, DCS cites *State Dep’t of Children’s Services v. D.D.T.*, No. M2006-00671-COA-R3-PT, 2006 WL 2135427 (Tenn. Ct. App. M.S., filed July 31, 2006) and *State Dep’t of Children’s Services v. L.H.*, No. M2007-00170-COA-R3-PT, 2007 WL 2471500 (Tenn. Ct. App. M.S., filed Aug. 31, 2007). In *D.D.T.* and *L.H.*, this court recognized that “abandonment constitutes an aggravated circumstance for which Tenn. Code Ann. § 37-1-166(g)(4) relieves [DCS] of the duty to make reasonable efforts to reunify the family.” See also *In re Meagan E.*, No. E2005-02440-COA-R3-PT, 2006 WL 1473917, at *6 (Tenn. Ct. App. E.S., filed May 30, 2006). In none of these previous cases, however, did the court address the question of exactly when DCS is relieved of its statutory duty to make reasonable efforts.

Under ordinary circumstances, the law governing termination of parental rights proceedings imposes upon DCS the responsibility to make reasonable efforts to reunify children and their parents after DCS removes the children from the parents’ home. *In re Tiffany B.*, 228 S.W.2d 148, 157-58 (Tenn. Ct. App. 2007). This court has discussed and emphasized the importance of DCS’s role in this regard on numerous occasions, noting that “[i]n many circumstances, the success of a parent’s remedial efforts is intertwined with the efforts of [DCS’s] staff to provide assistance and support.” *In re C.M.M.*, No. M2003-01122-COA-R3-PT, 2004 WL 438326, at *7 (Tenn. Ct. App. M.S., filed Mar. 9, 2004); see also *In re Giorgianna H.*, 205 S.W.3d 508, 518 (Tenn. Ct. App. 2006) (stating “The success of a parent’s remedial efforts generally depends on the Department’s assistance and support.”); *In re J.A.W.*, No. M2007-00756-COA-R3-PT, 2007 WL 3332853, at *4 (Tenn. Ct. App. E.S., filed Nov. 8, 2007); *In re Randall B.*, No. M2006-00055-COA-R3-PT, 2006 WL 2792158, at *5-6 (Tenn. Ct. App. M.S., filed Sept. 28, 2006). The efforts required of DCS are reasonable efforts in light of the specific circumstances presented, not “herculean” efforts. *Id.*

The Tennessee General Assembly, however, has relieved DCS of its duty to provide reasonable efforts to assist parents from whose homes it has removed their children under certain statutorily defined circumstances, including when a court of competent jurisdiction has determined, among other things, that a parent has committed murder, voluntary manslaughter, felony assault,

aggravated or especially aggravated kidnapping, aggravated child abuse, aggravated or especially aggravated sexual exploitation of a minor, rape, incest, severe child abuse, or “abandonment,” as defined by Tenn. Code Ann. § 36-1-102(1). These circumstances relieving DCS of its responsibilities are labeled “aggravated circumstances” by the statute, Tenn. Code Ann. § 37-1-166(g), which further provides in relevant part as follows:

(2) Except as provided in subdivision (g)(4), reasonable efforts shall be made to preserve and reunify families:

(A) Prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home; and

(B) To make it possible for a child to safely return to the child’s home.

(3) If continuation of reasonable efforts of the type described in subdivision (g)(2) is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child.

(4) Reasonable efforts of the type described in subdivision (g)(2) shall not be required to be made with respect to a parent of a child *if a court of competent jurisdiction has determined that:*

(A) The parent has subjected the child that is the subject of the petition or any sibling or half-sibling of the child who is the subject of the petition or any other child residing temporarily or permanently in the home *to aggravated circumstances as defined in § 36-1-102;*

(B) As set out in § 36-1-113, the parent has:

(i) Committed murder of any sibling or half-sibling of the child who is the subject of the petition or any other child residing temporarily or permanently in the home;

(ii) Committed voluntary manslaughter of any sibling or half-sibling of the child who is the subject of the petition or any other child residing temporarily or permanently in the home;

(iii) Aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter of the child or any sibling or half-sibling of the child who is the subject of the petition or any other child residing temporarily or permanently in the home; or

(iv) Committed a felony assault that results in serious bodily injury to the child or any sibling or half-sibling of the child who is the subject

of the petition or any other child residing temporarily or permanently in the home; or

(C) The parental rights of the parent to a sibling or half-sibling have been terminated involuntarily[.]

Tenn. Code Ann. § 37-1-166(g) (emphasis added).

Tennessee Code Annotated § 36-1-102(9) defines “aggravated circumstances” to mean “*abandonment*, abandonment of an infant, aggravated assault, aggravated kidnapping, especially aggravated kidnapping, aggravated child abuse and neglect, aggravated sexual exploitation of a minor, especially aggravated sexual exploitation of a minor, aggravated rape, rape of a child, incest, or severe child abuse, as defined at § 37-1-102.” (emphasis added). As is seen from the italicized portion of the statute cited above, its plain language relieves DCS of its responsibility to make reasonable efforts *only if* a court of competent jurisdiction has made a determination that aggravated circumstances exist, along with the other statutory requirements. The statute does not allow DCS to take the approach of doing nothing on a parent’s case, providing no assistance, in the hopes that a court will later make a finding of abandonment that retroactively “forgives” DCS’s lack of efforts, particularly when, as is the case here, DCS’s failure to make a reasonable effort arguably was a significant factor in enabling DCS to argue that Mother abandoned her children.

We believe the most reasonable and natural interpretation of the statute at issue is that DCS is relieved of its responsibility to make reasonable efforts to assist in the preservation and reunification of families that the State has decided to separate *at such time* that a court of competent jurisdiction makes the required determination of aggravated circumstances, and not before. Prior to such a determination, DCS must continue to make reasonable efforts. To hold otherwise would be to create an unacceptable level of uncertainty among DCS’s staff members as to whether, and when, they are required to exercise reasonable efforts, because the answer to that question would not be clear until a trial court, or possibly an appellate court, rules on the issue of abandonment. A “wrong guess” on DCS’s part would create an unacceptably long delay in an area of the law, termination of parental rights, where expediency is of particular importance. We also make this determination mindful of a parent’s fundamental constitutional rights in this regard, and the profound, permanent consequences of an order terminating a person’s parental rights.

In summary, we do not agree with DCS’s argument that it had no duty in this case to make reasonable efforts to assist Mother from the time it took custody of the children until DCS filed its termination petition as a result of the trial court’s much later finding of abandonment. If, in a termination case, DCS believes it appropriate to be relieved of the responsibilities generally placed upon it by Tenn. Code Ann. § 37-1-166,⁵ it should petition the trial court for a “determination” described and required by Tenn. Code Ann. § 37-1-166(g)(4). Of course, what constitutes

⁵We note that Tenn. Code Ann. § 37-1-166 is not the only source of DCS’s duty to exercise reasonable efforts; our courts have also recognized that Tenn. Code Ann. § 36-1-113(i) requires reasonable efforts on the part of DCS. See *In re C.M.M.*, 2004 WL 438326, at *5-8; *In re A.W.*, 114 S.W.3d 541, 545-46 (Tenn. Ct. App. 2003); *In re B.S.G.*, No. E2006-02314-COA-R3-PT, 2007 WL 1514958, at *9 (Tenn. Ct. App. E.S., filed May 24, 2007).

“reasonable” efforts on DCS’s part is defined and determined by the circumstances; in some situations a parent’s conduct may make relatively minimal efforts “reasonable” under the circumstances. In such situations, or when DCS concludes that a parent is himself or herself making no efforts, or that efforts at a reunification attempt will be useless, several avenues will be available to DCS to obtain the judicial determination required by the statute. DCS may change the goal in parent’s permanency plan, thereby triggering judicial review of the change, or DCS may proceed to file a termination petition. In any event, both the parents and the trial court will be placed on notice of DCS’s position that it should be relieved of further efforts, and of the facts and reasons supporting this position. It will further be clear to all parties involved, by virtue of the trial court’s determination, exactly at what point in time DCS is relieved from making reasonable efforts otherwise generally required.

C. Termination of Father’s Parental Rights

The trial court terminated Father’s parental rights based on its findings by clear and convincing evidence that Father had willfully abandoned his children, that Father was in substantial noncompliance with the permanency plan, and that termination of Father’s rights was in the best interest of the children. As we have stated, Father, unlike Mother, clearly had notice of the legal proceedings regarding his children; he participated in the development of the permanency plans; and he signed the plans and the provided statement of criteria and procedures for termination of parental rights. At the beginning of the termination hearing, Father, through his counsel, stated to the trial court that he “has elected not to contest the termination” of his parental rights. Father continued to take this position throughout the entire course of the hearing. Although the State put on evidence supporting its argument that Father’s parental rights should be terminated, Father did not challenge or contest this evidence.

On appeal, Father argues for the first time that the trial court erred in terminating his parental rights. His appellate brief explains why, stating as follows:

[Father] elected not to contest the termination of his rights during the April 11, 2007 hearing. [Father] believed that his parents . . . would be granted custody. In this way, he could continue to maintain a relationship with his children.

* * *

The grandparents have continued to seek adoption of the children, yet have encountered numerous obstacles. [Father] now appeals termination of his parental rights because the expectation that his parents would adopt his children has been disappointed. In addition, [Father] avers that DCS has failed to meet its burden of proof.

At the hearing, the trial court made it clear to Father that the issues of the case only involved his and Mother’s parental rights, stating at the very beginning: “This is involving the mother and father, not the grandparents. This has nothing to do with the grandparents whatsoever.”

At trial, Father did not raise or contest the issue of whether the trial court erred in terminating his parental rights. This court does not generally consider issues that are raised for the first time on appeal. *In re J.R.B.*, No. M2007-00442-COA-R3-PT, 2007 WL 3244637, at *8 (Tenn. Ct. App. M.S., filed Nov. 2, 2007); *Lawrence v. Stanford*, 655 S.W.2d 927, 929 (Tenn. 1983). Father was represented by able counsel at the trial, and he had notice of, and a meaningful opportunity to participate in, the termination proceedings. The general rule that issues not raised at the trial level may not be raised on appeal is applicable here; therefore, we decline to disturb the trial court's ruling terminating Father's parental rights.

IV. Conclusion

Our decision affects only the ruling terminating Mother's parental rights and does not reach issues of placement, custody or visitation. In the case of *In re J.L.E.*, the court made the following comments that are equally applicable to Mother's situation in this case:

The record before us includes evidence of Child's improvement in the stable environment of the foster home where he was placed as well as the excellent care he has received from his foster parents. We cannot reach the issue of Child's best interests because no ground for termination has been proved. However, our decision herein does not affect Child's placement or custody. The juvenile court retains authority over those issues. Child may remain in the setting that has proved beneficial to him, if the court so determines, until circumstances warrant a reconsideration.

In re J.L.E., 2005 WL 1541862, at *16.

For the aforementioned reasons, the judgment of the trial court terminating Mother's parental rights is reversed. The judgment of the trial court terminating Father's parental rights is affirmed. Costs on appeal are assessed to the Appellee, State of Tennessee, Department of Children's Services.

SHARON G. LEE, JUDGE